Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

HON. FRANK G. VOLLOR,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a temporary injunction barring the broadcast of advertisements because they mention a political candidate violate the First Amendment to the United States Constitution?

2. Does the First Amendment standard of "express advocacy" as defined in *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life* require words that expressly advocate the election or defeat of a clearly identified candidate?

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States was incorporated in the District of Columbia in 1916. It is a non-profit, non-stock corporation, exempt from taxation under I.R.C. § 501(c)(6).

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The Chamber of Commerce of the United States of America ("Chamber") respectfully petitions for a writ of certiorari to review the November 3, 2000, Judgment of the Supreme Court of Mississippi that refused to stay the November 3, 2000, Order Granting Plaintiffs' Motion for Temporary Restraining Order ("TRO") against the Chamber's political speech.

OPINIONS AND ORDERS BELOW

The Order of the Mississippi Supreme Court (No. 2000-M-01839) is at Appendix ("Pet. App.") 1a. The Temporary Restraining Order of the Chancery Court of the First Judicial District of Hinds County, Mississippi (No. G-2000-2128 S/2) is at Pet. App. 2a. The stays issued by Mr. Justice Scalia are at Pet. App. 5a-7a. The November 2, 2000, Memorandum Opinion and Order of the United States District Court for the Southern District of Mississippi in *Chamber of Commerce of the United States of America v. Moore* (No. 3:00-cv-778WS) is at Pet. App. 8a. None of these opinions is officially reported.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a) (2000).

The Petition Is Timely

Both the Mississippi Supreme Court and the Hinds County Chancery Court entered their orders on November 3, 2000.

The Petition Presents A Live Controversy

Respondent obtained the TRO at issue here on November 3, 2000, for the purpose of suppressing speech until the election on November 7. The four days from November 3 to November 7 was not enough time for orderly review of the merits. This timing is not unusual. The type of prior restraint granted here naturally tends to be sought toward the

end of a campaign. But even if a restraint were sought months prior to an election, orderly pre-election review would seldom, if ever, be practical.[1] The Chamber expects to engage in similar speech during future elections in Mississippi and elsewhere. Thus, it will remain exposed to the same type of orders challenged here.

In short, this is a classic example of a case that is "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). In such a situation where "the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration" and "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again," this Court will grant review despite traditional jurisdictional constraints. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *see also Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

The Petition Challenges A Final Ruling

The petition here challenges a final judgment.[2] The November 3 TRO gave Plaintiff all the relief he sought (suppression of the Chamber's speech until after the

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[1] This Court has held, for example, that the typical human gestation period is too short to allow orderly review on the merits by this Court. *Roe v. Wade*, 410 U.S. 113, 125 (1973).

[2] *See* 15A Charles Alan Wright, et al., *Federal Practice and Procedure*, § 3912 at 449-50 (2d ed. 1992) ("[I]f suit is brought solely for the purpose of obtaining short-term injunctive relief, an order granting a temporary restraining order may be found appealable as a final judgment on the ground that it has effectively granted all the relief sought in the action"); 13 James Wm. Moore, *Moore's Federal Practice* § 65.41 (3d ed. 1997) ("the issue of appealability is not limited by the trial court's terminology"; "when the grant or denial of a temporary restraining order may dispose of the action for injunctive relief, the grant or denial has been held appealable").

November 7 election), and the Mississippi Supreme Court's denial of a stay assured that the TRO would have its full effect unless this Court intervened.

In prior restraint cases, this Court has taken a pragmatic approach regarding finality. For example, in *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam), a lower state court had enjoined a parade and the Illinois Supreme Court had denied a stay. This Court treated an application for a stay of a temporary injunction entered by the Cook County Circuit Court as a petition for certiorari and granted review, finding practical finality with respect to the speech restriction because "the outstanding injunction will deprive [the parade organizers] of rights protected by the First Amendment during the period of appellate review." *Id.* at 44. Likewise, in *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963), this Court held final and reviewed a preliminary injunction against picketing. *See also Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (reviewing a temporary injunction issued by an Illinois circuit court and upheld by an Illinois appellate court where the Illinois Supreme Court denied a motion for leave to appeal); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (Court review of a press gag order that had been modified and remanded by the Nebraska Supreme Court).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution forbids any State to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" or to "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Mississippi Code Annotated Section 23-15-801 (2000) defines various terms used in Mississippi's election laws. It defines an "Expenditure" as

> any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value, made by any person or political committee for the purpose of influencing any balloted measure or election for elective office . . . .

Miss. Code Ann. § 23-15-801(f)(i) (2000). The phrase "for the purpose of influencing" also is used in the definition of a "Political Committee," § 23-15-801(c), and of "Contribution," § 23-15-801(e)(i).

Section 23-15-801(j) defines "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate."

Section 97-13-15 defines "Prohibited political contributions by corporations." It forbids "any corporation, incorporated company, or incorporated association" to "give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property . . . in excess of One Thousand Dollars ($1,000.00) per calendar year for the purpose of aiding any political party or any candidate for any public office."

Section 23-15-1021 establishes "Judicial office donation limits." It makes it

> unlawful for any individual or political action committee . . . to give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property in excess of . . . Five Thousand Dollars ($5,000.00) for the purpose of aiding any candidate or candidate's political action committee for judge of the Court of Appeals or justice of the Supreme Court.

The Mississippi statutes empower the Secretary of State to assess civil penalties for violations. § 23-15-813. The Attorney General is authorized to enforce such assessments. *Id.* Also, criminal penalties are possible. §§ 25-15-811, 97-13-17.

Relevant portions of the Mississippi election statutes appear at Pet. App. 37a.

STATEMENT OF THE CASE

This case involves the first of four Mississippi state court injunctions that barred the public broadcast of certain Chamber advertising just before the November 7, 2000, election. The four injunctions all were issued in reliance on a U.S. District Court ruling stemming from the following events.

Facts Leading to TRO #1

The November 7, 2000, Mississippi election included races for four seats on the Supreme Court of Mississippi. The Chamber, a non-profit organization that represents business interests in dealing with all branches and phases of government, produced several television advertisements that it aired during the three weeks before the election. These advertisements addressed issues and qualifications of candidates, but did not contain any explicit words advocating electoral action.

Shortly after the Chamber began running its ads, Mississippi Secretary of State Eric Clark wrote to Mississippi Attorney General Michael Moore asking him to take action against the Chamber's ads under Mississippi's election statutes. Seeking to clarify the legal situation, the Chamber brought an action in the United States District Court for the Southern District of Mississippi, *Chamber of Commerce v. Moore* (Pet. App. 8a). The action named Attorney General Moore and Secretary of State Clark as defendants. It sought a

declaration that the Chamber's ads did not include express advocacy and, hence, were not subject to the Mississippi statute.[3] Defendants argued in response that Mississippi election law applied on the sole theory that the Chamber's ads "expressly advocate the election of the favored candidates for the four Mississippi Supreme Court seats," (Pet. App. 9a-10a) and thus were "'independent expenditures' subject to the reporting requirements" of Mississippi law. (Pet. App. 12a).

On November 2, 2000, United States District Court Judge Henry T. Wingate issued a Memorandum Opinion and Order in the Chamber's declaratory judgment action ("*Moore*"). Judge Wingate explained that the Chamber's ads were independent speech, there being "no proof whatsoever of any collaboration between the Chamber and the candidates involved in the advertisements." (Pet. App. 9a). Judge Wingate also did not find any explicit language advocating electoral action. His descriptions of the ads appear at Pet. App. 14a-16a.

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[3] Mississippi law imposes registration and disclosure requirements on organizations that make "independent expenditures." Miss. Code Ann. §§ 23-15-803 & 23-15-807 (2000). Such independent expenditures must be "expressly advocating the election or defeat of a clearly identified candidate." *Id.* § 23-15-801(j). Mississippi law also restricts corporate expenditures made "for the purpose of aiding any political party or any candidate for any public office." *Id.* § 97-13-15. This statutory framework is very similar to the language in the Federal Election Campaign Act that this Court held applicable only to speech that "in express terms advocate[s] the election or defeat of a clearly identified candidate" by using language such as "vote for" or "elect" or "defeat." *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam). The defendant state officials acknowledged that Mississippi's election statutes apply only to "express advocacy." They argued, however, that the Chamber's ads were express advocacy because they clearly implied support of or opposition to particular candidates.

Despite the absence of explicit language, Judge Wingate ruled for Defendants, holding that the Chamber's ads fell within a "Broader Interpretation" of express advocacy. (Pet. App. 23a, 30a-32a). He held that the Chamber advertisements "offer thinly veiled exhortations to support the campaigns of the aforesaid candidates, a plain, clever attempt to avoid the reach of Mississippi reporting and disclosure laws by eliminating those words listed at footnote 52 of *Buckley*." (Pet. App. 33a). The Judge acknowledged that his ruling adopted a minority position as to what *Buckley* meant by "express advocacy." (Pet. App. 23a). Judge Wingate's ruling did not become final until he entered judgment on January 23, 2001. (Pet. App. 34a), long after the events described here.[4]

On Friday, November 3, 2000, Judge Frank G. Vollor, one of the candidates for Mississippi Supreme Court Justice, sought a temporary restraining order ("TRO") from the Chancery Court of the First Judicial District of Hinds County, Mississippi. The Chamber's counsel was advised of this fact and summoned to a hearing less than an hour before the motion was to be heard by the Chancellor. The Chamber's counsel did not receive the motion papers until he arrived at the hearing.

Judge Vollor's motion papers attached the *Moore* opinion, asserting that it established that the Chamber's ads were "express advocacy" and, hence, subject to Mississippi's election statutes. (Pet. App. 66a). Judge Vollor offered no evidence beyond that contained in the motion papers. The Chamber's counsel argued, *inter alia*, that the requested injunction violated the First Amendment. (Pet. App. 56a).

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[4] The Chamber is appealing this judgment to the U.S. Court of Appeals for the Fifth Circuit.

Shortly after 4:00 p.m. on Friday, November 3, the Chamber's counsel received the Order Granting Plaintiffs' Motion For Temporary Restraining Order ("TRO #1") that is the subject of this petition. (Pet. App. 2a). TRO #1 enjoined both the Chamber and several television stations that had carried Chamber ads. The theory of TRO #1 was that Chamber television advertisements concerning the election were express advocacy and, hence, were subject to regulation under Mississippi's election laws. TRO #1 banned

> contracting to transmit or transmitting any television advertisement, which is paid for or produced by the Chamber of Commerce of The United States of America, its agents, servants, or employees, concerning the Central District election for the Supreme Court of Mississippi between Jim Smith and Frank G. Vollor.

(Pet. App. 4a). The enjoined stations ceased broadcasting the ads. *See* The Associated Press, *Court Lifts Ban on U.S. Chamber Ads*, Nov. 7, 2000, *available at* 2000 WL 29038411.

The November 3 TRO provided that it would remain effective for 10 days, well past the November 7 election. Because counsel for the Chamber had been heard before TRO #1 issued and the Chancellor had been advised of the Chamber's key defenses before he ruled, there was no prospect of reconsideration before November 7. Thus, at the trial court level, Plaintiff Vollor had obtained all of the relief he sought.

Appeals, Additional TROs, And Motions To Stay

TRO #1 was issued on a Friday afternoon, less than an hour before the Mississippi Supreme Court was to close for the weekend. With only minutes to spare, the Chamber filed emergency papers asking the Mississippi Supreme Court to stay and grant interlocutory review of TRO #1. The Chamber's papers contended that TRO #1 violated the First Amendment. (Pet. App. 52a).

At approximately 6:00 p.m. the Mississippi Supreme Court "denied" the stay application as "without merit." (Pet. App. 1a). The denial left the TRO in effect until after the election. Thus, the Mississippi Supreme Court ruling gave Plaintiff all the relief his papers sought.

The Chamber's counsel immediately contacted the staff of this Court by telephone to alert them that an application for emergency stay was being prepared. The Chamber's November 4, 2000, Motion for Emergency Stay of a Prior Restraint on Political Speech (No. 00A406) was delivered to the Supreme Court on Saturday, November 4. On the morning of Monday, November 6, 2000, Mr. Justice Scalia issued an Order that TRO #1 "is stayed pending the timely filing and disposition of a petition for writ of certiorari." (Pet. App. 5a).

By the time Mr. Justice Scalia granted a stay, two other Mississippi candidates for Supreme Court Justice had persuaded two other Mississippi judges to enter similar orders, one on Saturday, November 4 ("TRO #2"), and the other on Sunday, November 5 ("TRO #3"), forbidding Chamber advertising concerning those candidates. These orders (Pet. App. 57a-61a) were issued without any notice to the Chamber. The new TROs and the applications therefor were not materially different from TRO #1, which the Mississippi Supreme Court had refused to stay. In each case, the application papers relied solely upon the November 2 *Moore* opinion to assert that the Chamber's ads were subject to regulation by Mississippi's election statutes. The stations enjoined by TROs #2 and #3 ceased broadcasting the Chamber's ads.

The Chamber supplemented its stay application to seek relief from those further orders as well. November 5, 2000, Supplement to Motion for Emergency Stay of a Prior Restraint on Political Speech (No. 00A406). At about noon

on November 6, Mr. Justice Scalia issued a further Order staying TROs #2 and #3. (Pet. App. 6a).

On Monday, November 6, after Mr. Justice Scalia had stayed TRO #1, and while the Chamber was seeking relief from TRO #2 and TRO #3, Judge Vollor's counsel went back before the same Hinds County Chancellor who had issued TRO #1. Ostensibly acting on behalf of "William A. Pyle, a citizen of Mississippi," Judge Vollor's counsel applied for a new TRO. (In fact, Mr. Pyle is a lawyer and had assisted Judge Vollor's counsel in an undescribed capacity during the first TRO hearing of November 3. (Pet. App. 54a).) The motion papers confirm that both counsel and the Chancellor were aware of Mr. Justice Scalia's stay of TRO #1. (Pet. App. 76a). Moreover, counsel for the Chamber is informed that the Hinds County Chancery Court independently had been advised of that stay directly by the personnel of this Court. Judge Vollor's lawyer and the Chancellor both knew who was representing the Chamber since he had appeared to oppose issuance of TRO #1. Nevertheless, without giving notice to the Chamber or permitting it any opportunity to be heard, the Chancellor *ex parte* granted another injunction ("TRO #4"), this time to Mr. Pyle. (Pet. App. 62a).

TRO #4 was broader than TRO #1. It was not limited to ads concerning any particular judicial race, but rather covered any ad by the Chamber concerning any of the judicial elections occurring statewide. Nor was TRO #4 limited to the State of Mississippi. In addition to naming the Chamber and all Mississippi television stations, TRO #4 also named and enjoined two television stations in an adjacent state. *Id.*

Upon receipt of TRO #4, the Chamber again supplemented its application for a stay from this Court, November 6, 2000, Second Supplement for Emergency Stay of a Prior Restraint on Political Speech (No. 00A411), and another stay was granted by Mr. Justice Scalia. (Pet. App. 7a). Stations

resumed broadcasting Chamber ads on election day, November 7.

TRO #1 is the only injunction that the Mississippi Supreme Court specifically addressed. Thus, the Chamber directs this petition to TRO #1. However, the three other TROs raise essentially identical issues.

REASONS FOR GRANTING THE WRIT

Certiorari is appropriate here for two reasons. First, certiorari should be granted because state courts, like those below, increasingly have authorized prior restraints, including *ex parte* prior restraints. The injunctions here barred dissemination of political advertising because the speech mentioned a candidate and allegedly violated campaign finance laws. Indeed, four such injunctive restraints were imposed by three Mississippi courts in the week before the November 7, 2000, elections, including the injunction challenged here. One of the orders (TRO #4) was issued in the face of an emergency stay granted by Mr. Justice Scalia as Circuit Justice. Similar injunctions have been granted in past elections by other state courts in Wisconsin and Florida. *See Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 725 (Wis.), *cert. denied*, 528 U.S. 969 (1999); *Republican Party of Fla. v. Fla. Elections Comm'n*, 658 So. 2d 653, 653-55 (Fla. Dist. Ct. App. 1995). Unless this Court swiftly and authoritatively affirms First Amendment rights, future election-related advertising will be subject to a proliferation of such prior restraints.

Second, a split has developed among state and federal courts and agencies over the meaning of the First Amendment concept of "express advocacy" that this Court announced in *Buckley*, 424 U.S. at 44 & n.52, and reaffirmed in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"). This Court intended for the express advocacy standard to provide clear and certain guidance as to what

speech is subject to regulation, thus preventing a chill of permissible speech. At this point, however, there is sufficient uncertainty as to the meaning of that standard, as manifested by the TROs, to defeat its purpose. Only this Court can restore the needed certainty.

These two grounds for review are synergistic. The availability of a theory of implied express advocacy tempts litigants and courts to seek even broader prior restraints. The threat of such restraints chills even more speech. The Court should stop the growing practice of injunctions against political advertising. It should also reaffirm that independent speech may be subjected to campaign finance regulation only if it contains explicit language expressly advocating electoral action.

A. Prior Restraints Against Political Speech Are A Growing And Disturbing Practice That Requires This Court's Review

Prior restraints are "the most serious and the least tolerable" form of speech regulation. *Neb. Press Ass'n*, 427 U.S. at 559 (collecting authority). They are strongly presumed to be unconstitutional, even when their goal is to regulate a form of speech that the First Amendment does not protect. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam) (collecting authority).[5] Where a prior restraint otherwise might be permissible, such as in regulating

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[5] *Freedman v. Maryland*, 380 U.S. 51 (1965), contains criteria applicable to prior restraints. However, Mr. Justice Brennan, the author of *Freedman*, later explained that it "rest[s] upon the proposition that 'obscenity is not protected by the freedoms of speech and press.'" *New York Times Co. v. United States*, 403 U.S. 713, 727 n.* (1971) (Brennan, J. concurring). Following that concurrence, this Court has not applied *Freedman* to speech that categorically is protected by the First Amendment.

obscenity, it may not be imposed until after a final determination that the speech actually is obscene. *Id.*

"Temporary restraining orders and permanent injunctions —i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993), *cert. denied*, 522 U.S. 869 (1997). Political speech lies at the heart of the First Amendment. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). This is equally true whether the speech is express advocacy or something else.

This Court has never sustained an injunction against prospective political speech. In *Buckley* and *MCFL*, however, this Court held that the financing of some political speech pertaining to candidates may be regulated and even prohibited. Those holdings unfortunately have engendered a new willingness to enjoin political speech.

The circumstances that led to TRO #1 and the other injunctions are clear. Busy trial judges were importuned by candidates (fellow judges in Mississippi) with urgent claims that they were being injured by unlawful activity that, if not stopped immediately, would influence an impending election, causing them irreparable injury. The Chamber was from out-of-state and perhaps represented disfavored views. Reassured by *Buckley* and *MCFL* that some political speech is subject to regulation and that, under other authority, the express advocacy standard arguably is flexible, the trial courts granted injunctions even on an *ex parte* basis. As a result, advertising was suppressed at a vital time for political speech, immediately before an election.

The TRO challenged here was not an isolated act. Three different Mississippi judges independently granted three additional TROs against future political speech by the

Chamber. The Mississippi Supreme Court refused to intervene.[6]

Nor were the Mississippi judges the first to grant such injunctions. Comparable prior restraints have been imposed previously in both Wisconsin and Florida. In Wisconsin, two state circuit courts ordered on October 31, 1996, temporary injunctions restraining an organization, WMC Issues Mobilization Council, Inc., from broadcasting its advertisements related to legislative elections to be held on November 5, 1996. *See Wis. Mfrs. & Commerce*, 597 N.W.2d at 725. In Florida, the state Democratic Party sought and received emergency injunctions before the November 8, 1994, election to stop television broadcasts of two political ads purchased by the Republican Party of Florida. A temporary injunction issued from November 2 to November 4 and, after another hearing, from November 4. On December 1, after the election, a Florida circuit judge issued a supplemental temporary injunction after hearing a motion for reconsideration. *Republican Party of Fla. v. Fla. Elections Comm'n*, 658 So. 2d at 653-55. Only belatedly did an appellate Florida court reverse one of these injunctions as "an unconstitutional prior restraint of speech." *Id.* at 653, 657. In sum, such prior restraints are a growing phenomenon.

State courts are not subject to review by the federal courts of appeals. Only this Court can step in and make clear on a national basis that such prior restraints cannot be tolerated, at least in the absence of the most exigent circumstances, such as war or other threat to national security. Certainly such restraints cannot be justified by the alleged violation of regulatory requirements imposed by election law statutes or

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[6] The Chamber's ads directly addressed issues posed by the candidacies of several incumbent Justices of that court.

by claims of injurious falsehood of the type that has always been dealt with by defamation damages, not injunction.

B. The Standard Of "Express Advocacy" On Which The Prior Restraint Rests Is An Important Constitutional Issue On Which Federal And State Courts And Agencies Are Divided

The TROs against the Chamber were issued in reliance on the *Moore* Opinion. That District Court ruling permitted Mississippi regulation of the Chamber's independent speech, even though that speech contained no words of "express advocacy." In so doing, it gave further support to an erroneous position that is undermining the clarity that the express advocacy standard was intended to provide.

Buckley could not have been clearer that, to satisfy the First Amendment's demand for clarity and precision, the express advocacy standard required "express" words advocating electoral action. 424 U.S. at 44 & n.52. *MCFL* explicitly reaffirmed this understanding of *Buckley*. 479 U.S. at 249. Five U.S. courts of appeals have interpreted *Buckley* in light of *MCFL* and all five have demanded explicit advocacy.[7] For example, the Fourth Circuit held in *FEC v. Christian Action Network, Inc.* that:

> The [Supreme] Court opted for the clear, categorical limitation, that only expenditures for communications

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[7] *Citizens for Responsible Gov't State PAC v. Davidson*, Nos. 99-1414 *et al.*, 2000 WL 1902427 (10th Cir. Dec. 26, 2000); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997); *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8 (D. Me.), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997); *Faucher v. FEC*, 743 F. Supp. 64 (D. Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991).

> using explicit words of candidate advocacy are prohibited, so that citizen participants in the political processes would not have their core First Amendment rights to political speech burdened by apprehensions that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election result.

110 F.3d at 1051.

Nevertheless, there has been a persistent effort to undermine *Buckley* and to erode the express advocacy standard into something less. Early impetus for this effort came from the Ninth Circuit's opinion *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). Although that opinion issued several weeks after *MCFL* (with the winter holidays intervening), it did not mention *MCFL*, and opined that explicit language calling for electoral action was not necessary and that "express advocacy" exists if an ad "read as a whole" and in "context" is "suggestive of only one plausible meaning." *Id.* at 864.[8]

When it opposed a petition for certiorari in *Furgatch*, the Federal Election Commission ("FEC") argued that the opinion had no significance in light of *MCFL*.[9] However, after certiorari was denied, the FEC seized on the Ninth Circuit's language, 807 F.2d at 864, and amended its regulations, adding a subsection (b) which provides that "expressly advocating" means:

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[8] This language also was cited by the District Court for the District of Columbia in *FEC v. National Organization for Women*, 713 F. Supp. 428, 434 (D.D.C. 1989).

[9] In opposing a writ of certiorari in *Furgatch*, the FEC represented to the Supreme Court that the Ninth Circuit decision should be ignored in light of the *MCFL* decision. *See Christian Action Network*, 110 F.3d at 1054.

> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b) (2001). Twice the FEC has been enjoined from enforcing this part of its regulations, but it remains on the books and the FEC never has conceded that it is invalid.[10]

Several state courts either adopted a theory of implied express advocacy or have indicated that it may be viable. For example, the Wisconsin Supreme Court ruled that relying on implications that are made clear by the "context" of speech may well be appropriate. *Wis. Mfrs. & Commerce*, 597 N.W.2d at 733.[11] The Court of Appeals of Oregon similarly looked for the "essential message" in light of "context."

> The purpose is not to search for magic words—which careful drafters can, as in this case, usually avoid—but to find the essential message that the publication

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[10] Subsection (b) was enjoined in *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998), and enjoined nationwide in *Virginia Society for Human Life, Inc. v. FEC*, 83 F. Supp. 2d 668 (E.D. Va. 2000).

[11] The Court elected not to apply the standard in that case because defendants had not been given fair advance notice. *Id.* at 734.

> communicates to the reader. In doing this, the context of the publication—particularly whether or not it came in the midst of a contested election campaign—can play a role in determining how the reader would understand it and, thus, what its message is.

State ex rel. Crumpton v. Keisling, 982 P.2d 3, 10 (Or. Ct. App. 1999) *review denied*, 994 P.2d 132 (Or. 2000).

The November 2, 2000, *Moore* opinion acknowledged that speech like the Chamber's ads "occupies the highest rung of the hierarchy of First Amendment values." (Pet. App. 18a). *Moore* recognized that, in the "fountainhead case" of *Buckley*, 424 U.S. at 44 & n.52, this Court defined the concept of "express advocacy" to require "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' and 'reject.'" (Pet. App. 18a). *Moore* described the Chamber's ads (Pet. App. 14a-16a), making clear that they contained no such express language. Nevertheless, *Moore* ruled that, viewed in the context of an ongoing election, the ads clearly implied an electoral message and, thus, constituted express advocacy subject to regulation under Mississippi law.

Moore declined to construe *Buckley* and *MCFL* "narrowly" to establish a "bright line" test. Instead, the court adopted (Pet. App. 23a) a "Broader Interpretation" of express advocacy based on *Furgatch* and *MCFL*, as well as opinions in three states, Texas (*Osterberg v. Peca*, 12 S.W.3d 31, 52-53 (Tex.), *cert. denied*, 120 S.Ct. 2690 (2000)), Wisconsin (*Wis. Mfrs. & Commerce*, 597 N.W.2d at 723-24) and Oregon (*Crumpton*, 982 P.2d at 10), and one U.S. district court opinion, *FEC v. Nat'l Org. for Women*, 713 F. Supp. at 443.

According to *Moore*'s "Broader Interpretation," speech that clearly implies support for or opposition to a candidate constitutes express advocacy, even though it includes no explicit words advocating election or defeat of the candidate.

With specific reference to the Chamber's ads, the court held that an ad that portrays a "particular candidate as the person who will use common sense, ensure prompt adjudication of death penalty cases and uphold victim's rights" is not "true issue advocacy" and that "no reasonable viewer would construe the [ad]" as anything but express advocacy. (Pet. App. 31a-32a).

The Mississippi Chancery courts relied on *Moore*. *Moore* also induced the Ohio Elections Commission four days later on November 6, 2000, to reverse ground and hold that explicit language is not necessary to constitute express advocacy. In explaining the change in his vote—which was the deciding factor in a finding of probable cause—the chairman of the Ohio Elections Commission panel said:

> I am deeply troubled by the problems that we face. This appears to be an election year in which we conclude if something occurred 24 years ago it should be discarded; but of course, legal precedence 24 years old [*Buckley*] can't simply be discarded.
>
> With that passage of time, perhaps a good-faith belief can be held that if the [Supreme] Court were to have the matter before it again, that it might rule otherwise.

Common Cause/Ohio v. U.S. Chamber of Commerce, No. 2000E-058 (Ohio Elections Comm'n Nov. 6, 2000) (Transcript at 39-40). For discussion of this proceeding, see T.C. Brown, *State Goes In Search of Political Ads*, The Plain Dealer, Nov. 7, 2000, at 1B, *available at* 2000 WL 5174312.

Election authorities in other states also have indicated their belief that explicit language is not needed to establish express advocacy. For example, the Florida Division of Elections has opined that express advocacy includes speech that leaves an "unmistakable impression" of support for a candidate, Florida Div. Of Elections 94-15, quoted in *Fla. Right to Life, Inc. v.*

Mortham, 1998 WL 1735137, *3 (M.D. Fl. 1998) (granting preliminary injunction in part), *aff'd sub nom. on other grounds, Fla. Right to Life, Inc. v. Lamar*, 2001 WL 40216 (11th Cir. 2001).[12]

In short, while the strong majority position is that express advocacy requires explicit words advocating electoral action, a growing minority has emerged that now causes genuine uncertainty. This exposes independent speakers to unjustified government regulation of speech and potential liability for monetary fines and even criminal violations. *See* Miss. Code Ann. §§ 23-15-811, 23-15-813, 97-13-17. Only this Court can restore the clarity *Buckley* intended.[13] Until this Court

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[12] Numerous legal periodicals reflect the confusion that has been created by opponents of the "express advocacy" standard. *See, e.g.*, Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws*, 8 Kan. J.L. & Pub. Pol'y 90 (1999) (asserting that there is chaos over the meaning of express advocacy and advocating a loose standard); Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 Cath. U. L. Rev. 107 (1999) (acknowledging current dispute and attacking explicit language requirement); Michael D. Leffel, Note, *A More Sensible Approach to Regulating Independent Expenditures: Defending the Constitutionality of the FEC's New Express Advocacy Standard*, 95 Mich. L. Rev. 686 (1996) (acknowledging current uncertainty and advocating a context-sensitive approach); Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Doctrine*, 10 Stan. L. & Pol'y Rev. 33 (1998) (FEC Commissioner Thomas and colleague arguing in support of FEC's context and implication regulation); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L. Rev. 1751 (1999) (proposing an alternative definition of election-related activity); Allison Rittenhouse Hayward, *Stalking the Elusive Express Advocacy Standard*, 10 J.L. & Pol. 51 (1993) (describing existing uncertainty and inconsistency and resulting chill). The first four articles were relied upon in Defendants' Memorandum of Law in Opposition to Plaintiff's Complaint for Expedited Declaratory Relief in *Moore*.

[13] Now that final judgment has been entered, the Chamber is pursuing an appeal of *Moore* to the Fifth Circuit. However, a ruling by that court

does so, the purpose of the express advocacy standard is being defeated because political speech is being chilled, including through the growing use of unconstitutional prior restraints.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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will not bind the Mississippi's courts or private litigants there. Nor will it bind other courts and litigants across the country.